UNITED STATES OF AMERICA	)	
	)	**Defense Brief on Standard for Good Cause Challenge of Commission Members**
v.	)	
	)	7 September 2004
DAVID M. HICKS	)	

Introduction:

The Presiding Officer has asked the parties to provide a brief to the Appointing Authority on the subject of what standard applies to challenges for "good cause" under MCO 1 Sec. 4 A(3). The answer to this question can be found by examining the requirements and provisions of MCO 1, determining how they can best fulfill the President's directive that the military commission proceedings be "full and fair," and comparing them to the requirements and provisions of UCMJ Art. 25, RCM 912 f, as well as corresponding principles applicable in the U.S. criminal justice system, along with the case law flowing from these several jurisprudential systems and provisions.

Review of the provisions of MCO 1 and the UCMJ, as well as the U.S. Constitution and relevant criminal justice system authority, demonstrates that the requirements and provisions of MCO 1 as to "good cause" challenges, if not actually derived from the UCMJ and RCM, and/or the parallel criminal justice concepts, are nonetheless substantially similar, both in language and intent. Accordingly, the standard to be applied for "good cause" challenges under MCO 1 Sec. 4, should be the same as that set forth in RCM 912 f, and should be consistent as well with constitutional and criminal law principles. Any other standard for "good cause" challenges under MCO 1 Sec. 4 would ignore its plain meaning and the intent of the President, expressed in the President's Military Order, to ensure that trials by military commission are "full and fair."

In addition, a brief review of the results of the *voir dire* performed during the Commission proceedings conducted August 23-26, 2004, at the U.S. Naval Station, Guantanamo Bay, Cuba, further demonstrates the need for a standard for "good cause" that incorporates UCMJ 912 f and the appearance of bias or partiality.

Discussion:

A. ***The Military Justice System***

The requirements for persons serving as members of court-martial panels are virtually identical to the requirements for serving as a member of a military commission. The requirements under UCMJ Art. 25 for service as a court-martial panel member are

that the person be a commissioned officer on active duty,[1] and that the convening authority select those that in his or her opinion are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.[2] Similarly, the only requirement to serve as a member of a military commission is that a member of the panel be a "commissioned officer of the United States armed forces" on active duty who is "competent to perform the duties involved."[3]

While MCO 1 Sec. 4 A(3) does not explicitly require the Appointing Authority to use the UCMJ Art. 25 criteria for the selection of commission members, the memorandum the Appointing Authority's office sent to the various services requesting nominees for military commission members reflected UCMJ Art. 25's requirements.[4]

Under RCM 912 f, courts-martial members may be challenged and removed from service on a panel for "cause." Similarly, MCO 1 Sec. 4 A(3) allows the appointing authority to remove members for "good cause."

Given the similarities between the selection and removal criteria for the two systems, it is evident that the expressed goals of the two systems are similar—to provide a fair trial for the accused. This fact is borne out in pronouncements by the Court of Appeals for the Armed Forces (CAAF), and by the orders put forth by the DoD for the conduct of military commissions.

The CAAF has stated that an accused has a right to a fair and impartial panel.[5] Similarly, MCO 1 Sec. 6 B sets forth the primary duties of military commission panels as

(1) Providing a full and fair trial;

(2) Proceeding **impartially** and expeditiously, strictly confining the proceedings to a full and fair trial of the charges, excluding irrelevant evidence (emphasis added); and

(3) Holding open proceedings (with certain exceptions for security reasons).[6]

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[1] UCMJ Art. 25 also has provisions for placing warrant officers and enlisted personnel on courts-martial panels. The requirements for warrant officer and enlisted persons to sit as members of courts-martial are the same as those for commissioned officers. However, these personnel may only sit on courts-martial of certain personnel.

[2] See UCMJ Art. 25. UCMJ Art. 25 excludes certain classes of people involved in a case, namely the accuser, witnesses, and those that investigated the case, from sitting on a case in which they were involved.

[3] MCO 1 Sec. 4 A(3).

[4] In a memorandum dated 20 December 2002, Mr. William Haynes II of the DoD General Counsel's Office requested that the various Secretaries of the Military Departments provide nominees to serve as commission members and presiding officers. Among the criteria listed were that the nominees should be O-4 and above, have a reputation for integrity and good judgment, have combat or operational experience, and command experience.

[5] *United States v. Strand*, 59 M.J. 455, 458 (CAAF 2004).

According to the CAAF, there is only one way to ensure an accused gets an impartial panel—by allowing challenges for cause set forth in RCM 912(f) to be applied. In *United States v. Strand*, CAAF stated:

> This Court has held that an accused "has a constitutional right, as well as a regulatory right, to a fair and impartial panel." Thus, "Rule for Courts-martial 912(f)(1)(N) . . . requires that a member be excused for cause whenever it appears that the member 'should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality.'" While this rule applies to both actual and implied bias, the thrust of this rule is implied bias. Moreover, "the focus of this rule is on the perception or appearance of fairness of the military justice system[,]" since "the rule 'reflects the President's concern with avoiding even the perception of bias, predisposition, or partiality.'" [citations omitted][7]

The President's Military Order requires that Mr. Hicks receive a full and fair trial. The provisions of MCO 1 Sec. 6 B must therefore be read in a manner that fully effectuate the letter and spirit of that purpose. Besides explicitly directing the members to provide a "full and fair" trial, MCO 1 Sec. 6 B requires all sessions to be held in the open. This particular provision is designed to allow public access to the proceedings to provide the maximum measure of transparency in the system.

MCO No. 1's concern for transparency in the system, manifested in Sec. 6 B thereof, is the same as that expressed by the President regarding the military justice system under the UCMJ – specifically, the President's concern with avoiding even the appearance of bias, predisposition, or partiality. Just as allowing public access to the hearings addresses this concern, using the standards set forth in RCM 912 f for challenge and removal of commission members is critical to avoiding such perceptions in the military commissions process. Otherwise, the integrity of the military commissions will have been fatally compromised at its core.

B. *The Civilian Criminal Justice System*

The Sixth Amendment to the United States Constitution guarantees a "speedy and public trial, by an impartial jury." As the Supreme Court articulated in *Irvin v. Dowd*, "the right to [a] jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process." 366 U.S. 717, 722 (1959).

In civilian criminal trials, through the exercise of peremptory challenges and challenges for cause, counsel for both sides seek to inject fairness into the trial process by

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[6] MCO 1 Sec. 6 B.

[7] United States v. Strand, 59 M.J. 455, 458 (CAAF 2004).

impaneling as impartial a jury as possible, excusing prospective jurors who appear to harbor opinions or bias predisposed to a specific outcome. Typically, a trial court judge hears argument on a challenge for cause, and if that judge refuses to excuse the juror for cause, counsel may strike the juror with a peremptory challenge. Thus, in the average civilian criminal trial, counsel has two opportunities to eliminate potential bias from infecting the jury.

Although the military commission at issue herein challenges for cause, the system under which it is constituted does not allow for peremptory challenges. Since counsel, therefore, has only one chance to protect the jury from the taint of bias, the standard for evaluating challenges for cause must be broad, and at least as expansive as the standard established through case law in civilian criminal cases.

Thus, the appearance of bias or impartiality must be incorporated within the definition of "good cause." So, too, must the principle that some prospective jurors have either too much exposure to the facts of the case, or possess emotions that are too intense, to permit them to sit in judgment – their protestations of impartiality and commitment to adherence to their duty notwithstanding.

Any beliefs so strongly held as to create doubt as to a juror's open mind disqualify a prospective juror from serving – even if such a juror proclaims a sincere belief in his ability to go forward impartially. As the Supreme Court recognized in *Morgan v. Illinois*, "it may be that a juror could, *in good conscience*, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs . . . would prevent him or her from doing so." 504 U.S. 719, 735 (emphasis added). Consequently, some prospective jurors, despite their declarations to the contrary, are beyond rehabilitation.

C. *The* Voir Dire *of the Commission Members*

During voir dire, each member of the military commission, who act as the prospective jurors in Mr. Hicks' trial, revealed individual bias towards the accused that plainly cannot be overcome with rehabilitation. In spite of their individual protestations that each could follow the law, these prospective jurors have been exposed to material facts in the case, carry personal interest in the outcome of the case, and face overwhelming pressure in the public eye and in the gaze of their military superiors to deny any potential bias that may be carried, regardless of their individual promises of "good conscience."

Colonel ***NAME REDACTED*** and Lieutenant Colonel ***NAME REDACTED*** cannot be impaneled as impartial jurors because each is a fact witness to the case. Each possesses abundant and detailed personal knowledge of the case, of the players, of the process, and neither can be expected to filter what he once knew from what he will hear during trial. As military personnel involved in the war in Afghanistan over a prolonged period of time in their individual capacity, both officers carry detailed independent knowledge about the field of combat. Mr. Hicks stands accused of actions arising on that very same field of combat. During voir dire, Colonel ***NAME REDACTED*** confirmed

that he "played a role in developing and executing war plans for Operation Enduring Freedom and Iraqi Freedom."[8]

Further, he described responsibilities to include the coordination of detainee movement[9] and disclosed his exposure to intelligence briefings on al Qaeda and the Taliban.[10] He confessed that he came across the name "David Hicks" while performing his duties, and, more importantly, he remembers this moment of initial exposure.[11] While the prosecution suggests that the presence of Mr. Hicks' name on a list that crossed Colonel ***NAME REDACTED***'s desk should be given minimal weight, Colonel ***NAME REDACTED*** testified that he not only knew Mr. Hicks' name was on the list but that he also knew the relevant criteria that had to be satisfied in order for Mr. Hicks's name to appear on that list.

Colonel ***NAME REDACTED*** understood that Mr. Hicks' name was included on a list of detainees because Mr. Hicks, like all detainees named on that list, had been screened and had been found to be a threat after preliminary investigation.[12] Given the detailed background knowledge that Colonel ***NAME REDACTED*** carries, he simply knows too much to be impartial. Indeed, he is more appropriately characterized as a potential *witness* in the case.

Lieutenant Colonel ***NAME REDACTED*** admitted to similar responsibility and exposure to military operation during the war effort in Afghanistan. He is an intelligence officer and, at the time of voir dire, was assigned to the Joint Task Force deployed for both Operation Enduring Freedom and Operation Iraqi Freedom with the mission to capture "enemy personnel."[13] His duties took him to Afghanistan between ***DATES REDACTED***, placing him in the theater of conflict at the exact time when David Hicks' was captured, detained and investigated.[14]

Although Lieutenant Colonel ***NAME REDACTED*** does not recall working directly on Mr. Hicks' case prior to the convening of this tribunal, as an intelligence officer who was in Afghanistan with the command to capture enemy fighters at the time Mr. Hicks was taken into custody, Lt. Col. ***NAME REDACTED*** certainly was at the same place, at the same time, as intelligence officers who would have had direct contact with Mr. Hicks. Lieutenant Colonel ***NAME REDACTED*** may, without his express knowledge, have assisted indirectly with Mr. Hicks' detention – and, given this very real possibility, he cannot be impaneled to sit in impartial judgment of Mr. Hicks.

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[8] See transcript of Mr. Hamdan's preliminary hearing on 8/24/04, p.64.
[9] *Id*. at p.62.
[10] *Id*. at 65.
[11] *See* transcript of Mr. Hicks' preliminary hearing on 8/25/04, p.56. It is also important to note that Colonel ***NAME REDACTED*** did not recognize other detainee names because, as he phrased it, he could not pronounce them. Given the uniqueness of Mr. Hicks' name, his identity was much more easily recognized and remembered.
[12] *See* transcript of Mr. Hamdan's preliminary hearing on 8/24/04, p.68. Further reference can be found in closed session transcripts.
[13] *Id*. at 77.
[14] *Id*. at 79.

Moreover, Lieutenant Colonel ***NAME REDACTED*** is not only more properly suited to be a witness than a juror/commissioner (as is Col. ***NAME REDACTED***), but he is also, by reason of his presence in theatre in Afghanistan, a potential *victim* of the offenses alleged against Mr. Hicks. Thus, he cannot serve on the commission that presides over Mr. Hicks's case.

In a civilian criminal case, a police officer from the same precinct as the arresting officer in a trial – much less an officer involved in the same investigation or task force – would never be allowed to sit as a juror in that trial, even if that police officer knew nothing at all about the specific case or the arresting officer. Nor would a person who was a member of a finite class of potential victims within a prescribed geographical space and/or temporal period. Such a possibility shocks the conscience in the civilian context, and the same must hold true in the military one.

Although Colonel ***NAME REDACTED*** and Lieutenant Colonel ***NAME REDACTED*** both assured defense counsel of their ability to maintain impartiality, these officers and Mr. Hicks are too intertwined with each other to disentangle sufficiently to guarantee a fair trial. Recently, in *Madrigal v. Bagley*,[15] a federal district court in Ohio held that a trial court properly excused a prospective juror for cause because that juror previously had been convicted of a felony by the same prosecutor and detective as were involved in defendant's case. According to the reviewing court,

> The trial court's focus was on [the juror]'s experience with the prosecutor and testifying officer during [the juror]'s prior felony case . . . Even if [the juror] had received a pardon, restoring his right to sit on a jury, the court would still have excused him for cause based on his previous involvement with the prosecutor and the detective. Further, the trial court's failure to question [the juror] about his bias toward the prosecutor and police officer is not an abuse of its discretion.[16]

Clearly, the issue in *Madrigal* was not the juror's prior conviction, or even his implied bias due to prosecution, but instead the juror's mere experience with the prosecutor and the detective triggers a proper excusal. The central question when impaneling a jury is one of impartiality – and the reviewing court in *Madrigal* recognized that personal, prior experience by a juror with any of those involved in the proceeding would corrupt due process.

Both Colonel ***NAME REDACTED*** and Lieutenant Colonel ***NAME REDACTED*** admit to substantial responsibility in the Afghanistan operation and both remember significant events (and the discussion surrounding these events) such as the arrest of a young Australian man named David Hicks. Although both men insist on their limited knowledge of the alleged facts leading to Mr. Hicks' detention, neither man denies his

[15] 276 F.Supp.2d 744 (2003).
[16] *Id* at 778.

experience with other military officers or with matters involving other detainees in Afghanistan contemporaneous with Mr. Hicks' investigation.

Under commission rules, these military officers must act not only as jurors in the process; however, these specific military officers should not be impaneled. Despite their most valiant effort towards erasing their rather intense and lasting personal recollections of their service, these particular military officers cannot be required to forget their extensive personal experiences in order to deliberate fairly or to overrule decisions made by their superiors, and under both Col. ***NAME REDACTED*** and Lt. Col ***NAME REDACTED*** operated faithfully during their service in the conflict in Afghanistan.

Col. ***NAME REDACTED*** and Lt. Col ***NAME REDACTED*** both were operating under a variety of commands during their service with respect to the conflict in Afghanistan, including (but not limited to) Rules of Engagement, applicability of the Geneva Convention(s), designation of detainees for transportation out of Afghanistan, and distinguishing the Northern Alliance from Taliban forces. As members of the military commission hearing Mr. Hicks's case, they would now be asked to review and, in many instances, repudiate those very commands under which they operated with such dedication. That places them in an impossible position, and creates a situation in which Mr. Hicks cannot receive a hearing from an impartial jury as that concept is defined under any established and legitimate legal process.

Furthermore, the tribunal cannot expect impartiality when Colonel ***NAME REDACTED*** and Lieutenant Colonel ***NAME REDACTED*** have independent personal knowledge of material facts that may not be admissible in court. Exposure to inadmissible evidence automatically creates bias, automatically generating predisposition to an opinion that forces the evidence actually presented in court to work that much harder to overcome the initially preconceived ideas. This effectively shifts the burden onto the defense to prove innocence, stripping the defendant of his presumption of innocence.

Ultimately, it is impossible to sift through and marshal information according to what one hears through testimony and what one knows through prior experience. It is unfathomable to expect a juror, in the throes of difficult deliberation in a highly public and intensely emotional case, to separate what he knows into two categories: what he knows from the courtroom and what he knows from life. Expecting such is not only unrealistic but also violates due process in the most fundamental way.

As Justice Frankfurter explained in his concurring opinion in *Irvin v. Dowd*:

> One of the rightful boasts of Western civilization is that the State has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure . . . How can fallible men and women reach a disinterested

> verdict based exclusively on what they heard in court when, before they entered the jury box, their minds were saturated . . ?[17]

Nor is devotion to duty – in this case, to adjudicate Mr. Hicks's trial fairly and impartially – a substitute for a jury that is not tainted by personal knowledge and/or too much emotional involvement in a case. Out of intense desire to do the "right" thing in the eyes of the world, commission members will say whatever needs to be said in order to uphold the appearance of fairness, and not shirk their assignment to the commission. As Justice Stevens wrote in dissent in *Patton v. Yount*, with Justice Brennan joining, "some veniremen might have been tempted to understate their recollection of the case because they felt they had a duty to their neighbors 'to follow through.'"[18]

An officer's professional commitment to the task which he has been ordered to perform, or even the very real human inclination to please those who may be watching and scrutinizing, cannot be ignored – not when the stakes are so high with a man's liberty at stake and the tribunal's entire legitimacy in question. *See Murphy v. Florida*, 421 U.S. 794 (1975) (recognizing the prejudicial effect the setting of a trial may have on juror impartiality and the inference of actual prejudice that may be drawn from the jury selection process when most jurors admit to bias but others refuse it "too" adamantly). *See also Morgan v. Illinois*, 504 U.S. 719 n. 9 (1992) (citing an exchange between a trial judge and a prospective juror in which the juror claimed to be able to follow the law as it is given to her but simultaneously admitted that she could not impose the death penalty, emphasizing the natural tendency to want to please an authority figure despite holding strong beliefs that would prevent one from doing so).

Here, Colonel ***NAME REDACTED***, with honorable candor, spoke of his intense emotional reaction to Ground Zero only two weeks after the terrorist attack, in which he lost a Marine under his command.[19] While the Colonel explains that in his twenty-eight years in the service he has lost a number of men, he also admits that with each loss he feels deep sadness. And, in the case of the September 11th attacks, he felt deep anger as well.[20] Though most Americans, and possibly all military personnel, are gripped by strong emotion, whether sadness, anger, confusion, frustration, fear, or revenge, at the memory of the September 11th attacks, those military men who openly confess their deep emotional connection to the tragedy should not be invited to participate in the adjudicatory process.

In a civilian criminal case, a prospective juror who was impacted personally by a crime would not be allowed to sit on the jury trying the person accused of committing that crime. The very notion of such a possibility conjures images of "mob justice" – not due process. Colonel ***NAME REDACTED'*** outstanding career history with the Marines is inspiring; however, his honest words cannot be overlooked or underestimated.

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[17] 366 U.S. 717, 729 – 30 (1961).
[18] 467 U.S. 1025, 1044 (1984).
[19] See transcript of Mr. Hamdan's preliminary hearing on 8/24/04, p.57. Colonel ***NAME REDACTED*** also admits to attending the fallen Marine's funeral and speaking with his family, illustrating the close bond the colonel shared with this man. See also transcript of Mr. Hicks' preliminary hearing on 8/25/04, p.48.
[20] See transcript of Mr. Hamdan's preliminary hearing on 8/24/04, p.58.

Alternate-juror Lieutenant Colonel ***NAME REDACTED*** echoed Col. ***NAME REDACTED***' strong emotional reaction,[21] and Lt. Col. ***NAME REDACTED*** also confessed to total inexperience with the juror deliberation process.[22] Every other member of the commission has had some type of prior exposure to the internal struggle created through deliberation; and, given the highly emotional nature of the charges against Mr. Hicks and the overwhelming public scrutiny accompanying the tribunals,[23] the typical internal dilemmas will only be exacerbated during Mr. Hicks's case.

At moments of intense stress and uncertainty, every person becomes more vulnerable to the effects of strong emotion as well as the desire to please on-lookers, whether consciously or unconsciously. And, Lieutenant Colonel ***NAME REDACTED***'s candid response about his emotional state in the context of the September 11th attacks, as well as the "strong apprehension"[24] he feels as a result of his participation on the commission, cannot be ignored in good faith. The mere threat that these emotions may influence his ability to hear evidence with an open mind precludes his inclusion as an alternate juror on Mr. Hicks' commission.

Conclusion:

The word "fair" has only one meaning. A fair trial in the military justice system under the UCMJ requires the use of the RCM 912 f standard for challenges for cause. A full and fair trial in the military commissions system requires the same standard for challenges of commission members. Accordingly, Mr. Hicks requests that the Appointing Authority apply the RCM 912 f standard to Mr. Hicks' good cause challenges to the members of the commission.

By: _____
M.D. MORI
Major, U.S. Marine Corps
Detailed Defense Counsel

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[21] See transcript of Mr. Hamdan's preliminary hearing on 8/24/04, p.84 – 85, 88.
[22] See transcript of Mr. Hicks' preliminary hearing on 8/25/04, p.82 – 83.
[23] See transcript of Mr. Hamdan's preliminary hearing on 8/24/04, p.85, 88 – 89. Lieutenant Colonel ***NAME REDACTED*** expresses considerable concern over the amount and type of media attention the tribunals had been receiving, and he voiced "strong apprehension" about the repercussions he and his family might face due to his involvement. Clearly, Lt. Col. ***NAME REDACTED*** feels very vulnerable as a member of the commission and therefore is more prone to deliberating in a way to protect both himself and his family.
[24] *Id*. at 89.